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In the Supreme Court of the United States

October Term, 1980

RICHARD J. ROME,
Petitioner,

vs.

STATE OF KANSAS, Ex Rel. COMMISSION ON JUDICIAL QUALIFICATIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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QUESTION PRESENTED FOR REVIEW

May the Kansas Supreme Court approve, sanction or impose lower standards of procedural due process as a matter of federal constitutional law in the removal proceedings of a state trial judge than this Court has in disbarment proceedings of an attorney at law?

Parenthetically, do this Court's standards, as set forth in *In Re Ruffalo* apply to state judicial removal proceedings?

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OPINION BELOW

The opinion of the Kansas Supreme Court is reported at 229 Kan. 195 (see Appendix A). The order of the Kansas Supreme Court denying the motion for rehearing is not reported, but is attached hereto (see Appendix B).

JURISDICTION

The opinion of the Kansas Supreme Court was filed on February 10, 1981. A timely motion for rehearing was filed on or about February 19, 1981. The order denying the motion for rehearing by the Kansas Supreme Court was entered on February 27, 1981. Petitioner received notice of said denial on or about March 3, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3). The instant petition for a writ of certiorari is filed within 90 days of the Kansas Supreme Court's order denying the motion for rehearing and service thereof upon Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The Petitioner is a former Associate District Judge of the 27th Kansas Judicial District, and held said position at all times material hereto. The court is located in Hutchinson, Reno County, Kansas, and Petitioner handled a large criminal docket.

On or about February 5, 1979, a criminal bail-bondsman named Jack Dean Stroud, wrote a letter to the Kansas Commission on Judicial Qualifications, complaining of Petitioner's actions as a judge. That letter was released by the bondsman to the news media almost immediately.

Over a month and a half later, the Commission wrote to Petitioner, advising him of an investigation into his judicial conduct. On June 7, 1979, the Commission filed two charges of judicial misconduct. Both counts dealt basically with the Petitioner's alleged attitude toward the

bondsman. The charges ranged from Petitioner's challenging the bondsman to a fistfight to having him murdered.

It should be noted here that the Petitioner did curb the bonding activities of the bondsman, a convicted felon, for failure to bring defendants to court or to pay off on forfeited bonds.

The entire thrust of the Commission's case against the Petitioner involved the said bondsman, his activities, and his relationship with one certain attorney. The Petitioner's defense was based thereon. Then, in late September and early October, 1979, the attorney for the Commission took sworn statements from certain witnesses which changed the entire direction of the inquiry. On November 5 and 6, 1979, the first two charges were tried to the Commission. One count was amended, deleting Petitioner's alleged threat to fight the bondsman. The latter was never served with summons, and never testified. The matters were taken under advisement. A month later, on or about December 5, 1979, the Commission had not reached a decision and decided to amend the notice and to file additional charges against Petitioner. Eventually, three different, additional charges were filed.

These additional charges involved Petitioner's attitudes toward the system of creating judges in his district. Petitioner favored popular election and the Respondents favored the selection method. Also, the charges alleged that Petitioner had challenged a local Sheriff to a fight and had criticized lawyers and a fellow judge in a memorandum opinion concerning a homosexual rape in the local jail, causing public dissemination thereof.

Petitioner, and his attorneys, objected to these additional charges being filed on several grounds. First of all,

they were based upon information that the Commission had received in the sworn statements taken before the trial in November, 1979. Secondly, they were based on information received after the Petitioner had taken the stand and testified in November. Thirdly, the affirmative defenses of estoppel, waiver and laches were raised.

Later, in April, 1980, the Petitioner requested an opportunity, at a pre-hearing conference, to have a full evidentiary hearing on the affirmative defenses. This request and a request for oral argument was denied summarily. The Commission chairman did, however, allow the Petitioner to file a written brief before making his decision as to whether or not to strike the defenses. Petitioner complied with the ruling and filed a written brief. Before the due time for the brief, and without having read said brief, the Commission chairman struck the defenses.

Petitioner was forced to go to trial on the additional charges on April 28 and 29, 1980, and was not allowed to present the affirmative defense testimony or evidence.

On June 5, 1980, the Commission found the Petitioner guilty of four counts of judicial misconduct, including all three amended or additional charges, and recommended his removal from the bench. Petitioner rejected the report and appealed to the Respondent Court. Petitioner remained on the bench throughout the appeal time until February 11, 1981, when the Kansas Supreme Court removed him "forthwith". A motion for rehearing was denied. It is these two decisions that Petitioner seeks to have reviewed.

REASON WHY THE WRIT SHOULD BE GRANTED

THE KANSAS SUPREME COURT HAS APPROVED, SANCTIONED AND IMPOSED A LOWER STANDARD OF PROCEDURAL DUE PROCESS AS A MATTER OF FEDERAL CONSTITUTIONAL LAW IN THE JUDICIAL REMOVAL PROCEEDINGS OF THE PETITIONER THAN THIS COURT HAS IN DISBARMENT PROCEEDINGS OF ATTORNEYS; SAYING, IN EFFECT, THAT JUDGES ARE NOT ENTITLED TO NOTICE OF AND AN OPPORTUNITY TO BE HEARD IN REMOVAL PROCEEDINGS OF THE LENGTH AND BREADTH OF AN INQUIRY BEFORE THEY TAKE THE STAND IN THEIR OWN DEFENSE.

The Petitioner argued from the first instance when the Commission below decided, after two full days of hearings and one month's deliberation in November and December, 1979, to file amended and additional charges against him, that he was being denied procedural due process of law. Petitioner, in his answer, requested that the three additional charges be dismissed. He further pleaded the affirmative defenses of estoppel, waiver and laches. A full statement of facts establishing these three affirmative defenses was set out in the said answers on or about January 31, 1980. At a pre-hearing conference on April 18, 1980, the Commission attorney orally moved to strike the Petitioner's affirmative defenses. A request for a full evidentiary hearing thereon was denied. Even oral argument was denied. The Chairman did, however, upon Petitioner's request, allow written legal briefs to be filed by both sides. These briefs were to be in the mail by midnight, April 24, 1980. Petitioner so complied. However, on the

morning of April 24, 1980, before the briefs had to be postmarked, and before receiving or even reading Petitioner's brief, the Chairman summarily struck the affirmative defenses. The Commission never filed a brief. The written order was written, typed, signed, mailed, and postmarked on April 24, 1980 - all before Petitioner's brief was due.

The Commission order prohibited any evidence at the formal hearings on April 28 and 29, 1980, in regard to the affirmative defenses. A motion, made orally, on the 28th of April, 1980, by Petitioner to continue the matters pending an interlocutory appeal to the Kansas Supreme Court on the question, was overruled. Later, on or about June 5, 1980, the Commission found Petitioner guilty of four of the five total charges, including all three amended or additional charges filed after the original hearings on November 5 and 6, 1979.

Petitioner argued to the Kansas Supreme Court that the filing of the three additional charges, after the trial had commenced on the original two counts, after he and his witnesses had testified, and after a month's deliberation by the Commission, that this was a violation of procedural due process of law. The Kansas Supreme Court failed to address or answer this problem, and affirmed it's Commission's findings and conclusions.

Petitioner argued the matter again on the motion for rehearing before the Kansas Court. The motion was denied without comment.

This Court decided in *In Re Ruffalo*, 88 S. Ct. 1222, 30 L. Ed. 2d 117, in 1968, that an attorney, in a disbarment proceeding, was entitled to be accorded by the State, procedural due process of the law. In other words an attorney is entitled to fair notice of the charge against him, and he is entitled to an opportunity to be heard thereon.

See: *In Re Oliver,* 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682. Disbarment for an attorney is a punishment or penalty, even though it is primarily designed to protect the public. *Ex parte Garland,* 4 Wall. 333, 380, 18 L. Ed. 366; *Spevack v. Klein,* 385 U.S. 511, 515, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574. Unless the proceedings are taken for matters occurring in the presence of judges, an attorney should be given notice of the charges made and an opportunity afforded for explanation and defense. See: *Selling v. Radford,* 243 U.S. 46, 51, 37 S. Ct. 377, 379, 61 L. Ed. 585.

Ruffalo sets this Court's guidelines for attorneys in disbarment cases. Petitioner argues that no lesser protection should be afforded in removal proceedings against judges. Removal from office for a judge is as grave as disbarment for an attorney. In both matters the individual is deprived of the means to make a living. There is great public embarrassment. Careers are sometimes destroyed.

Judicial Removal proceedings are adversary proceedings. They are quasi-criminal in nature. See: *In Re Gault,* 387 U.S. 1, 37, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527. The charge or charges must be known before the proceedings commence. At least the reach or the length and breadth of the proceedings should be made known to the judge. If not, they become a trap when, after the case has started, charges are added or amended on the basis of the testimony of the accused or his witnesses. At that point there is no opportunity to delete, alter or change earlier statements in order to start anew.

In the case at hand, the Commission commenced its case against the Petitioner upon the strength of statements by a criminal bailbondsman and an attorney with whom the former worked closely. That position was maintained by the Commission until the very moment of trial com-

mencement on November 5th, 1979, some nine months later. Then, the matter was amended, deleting a portion of one count accusing Petitioner of challenging the bondsman to a fight. The complainant never appeared. Later, after the Petitioner and his witnesses testified, and after the case was argued, and presented, the Commission, one month later, decided to amend and add new charges.

Add to this obvious lack of notice, the fact that the Commission, through its examiner and attorney, had received all of the information upon which the three "new" charges were based, via the sworn testimony of several witnesses. Yet the Commiisson failed to amend the charges prior to the commencement of the original trial beginning on November 5, 1979. It permitted the Petitioner to testify and present his defense. Then, the trap was sprung.

Petitioner set out this scenario in his affirmative defenses which have been referred to heretofore. The present defenses established estoppel, waiver, and laches on the part of the Commission. At least the Petitioner should have been allowed to present this testimony and evidence. However, even that was summarily denied by the Commission before they read the legal brief, which was filed on time and in accordance with the mandate of the chairman.

The Kansas Supreme Court, through its Judicial Qualifications Commission, consistantly, ab initio, denied the Petitioner the right to be heard on numerous contempt citations, motions and affidavits of recusation. A careful review of this record will show that the Petitioner was not given fair notice of the reach of the removal proceedings, or a fair opportunity to be heard. How the defense would have been conducted if all of the charges were filed initially in November, 1979, will never be known. The glaring fact is that the Petitioner had a right, as a citizen

of the United States, to know in advance of trial how far the Commission's inquiry would go. He was denied that right.

Thus, the Kansas Supreme Court has held by its decision herein, as a matter of federal constitutional law, that the standards of procedural due process set by this Court in *Ruffalo,* supra, for attorneys in disbarment proceedings, do not apply to judges in removal proceedings. That cannot be the law of this land. Judges are people. Judges are citizens. They should be afforded the same rights as other citizens. That includes the right to procedural due process of law when their property rights and their livelihood are threatened, and ultimately taken away.

CONCLUSION

For the reasons and arguments stated herein, the Petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Kansas, to review that Court's decision which ordered the Petitioner's removal from office as a judge, while denying said Petitioner his constitutionally protected right to procedural due process of the law.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 52,241

STATE OF KANSAS, EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS,
Petitioner,

v.

RICHARD J. ROME,
Respondent.

ORIGINAL PROCEEDING RELATING TO JUDICIAL CONDUCT
SYLLABUS BY THE COURT

The record in an inquiry relating to judicial conduct is held to show by clear and convincing evidence that an associate district judge violated Canons 1, 2, 3 (A)(1), 3 (A)(3), and 3 (A)(6) of the Code of Judicial Conduct all as is more fully set forth in the opinion, and removal from office is ordered.

Opinion filed February 10, 1981.

Edward G. Collister, Jr., Examiner, Commission on Judicial Qualifications, of Lawrence, argued the cause and was on the brief for the petitioner.

Lane H. Cronhardt, of Hutchinson, argued the cause, and *Donald L. Gottschalk*, also of Hutchinson, was on the brief for the respondent.

Per Curiam: This is an original proceeding in discipline against the Honorable Richard J. Rome, Associate

District Judge of Reno County. This court has jurisdiction under Art. 3, §15 of the Kansas Constitution.

The Commission on Judicial Qualifications found that respondent Judge Rome had violated Canons of the Code of Judicial Conduct in four of the five counts and recommended his removal from office. Judge Rome rejected the Commission's findings and recommendations and the matter is here for determination.

Respondent contends the Commission acted improperly in sixty particulars.

Respondent contends his constitutional rights were violated by the Commission's denial of his request for a jury trial. This same issue was raised by respondent in his earlier disciplinary proceeding and determined adversely to him in the opinion therein. *In Re Rome,* 218 Kan. 198, Syl. ¶4, 542 P.2d 676 (1975). We adhere to that determination based on the rationale expressed at page 204 of the opinion.

The bulk of respondent's claims of error relate to procedural matters and the admission and exclusion of evidence. We have carefully examined each point raised and have considered the same both individually and cumulatively. Further, we have thoroughly scrutinized the transcript and records of the entire proceeding. Nothing is to be gained from itemizing herein the various rulings and procedural matters asserted by respondent to be erroneous. It is sufficient to state the same have been considered and found to be without merit. We conclude: (1) The Commission afforded respondent a fair and impartial hearing; (2) respondent received due process of law; and (3) the rights of respondent were not prejudiced by any procedures or rulings of the Commission.

For convenience, the particular Canons of the Code of Judicial Conduct which the Commission found had been violated by respondent are reproduced herein as follows:

"CANON 1

"A Judge Should Uphold the Integrity and Independence of the Judiciary

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

225 Kan. cxix.

"CANON 2

"A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

"A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness."

225 Kan. cxix.

"CANON 3

"A Judge Should Perform the Duties of His Office Impartially and Diligently

"The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

"A. *Adjudicative Responsibilities.*

"(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

. . . .

"(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

. . . .

"(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of the court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

The participating members of the Commission were unanimous in their findings of fact, conclusions of law and recommendations, which are reproduced herein *in toto*:

"FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

"The foregoing cases were presented to the Commission in two separate evidentiary sessions. On November 5 and 6, 1979, evidence was produced on Counts I and II of the Amended Notice of Formal Proceeding before Commissioners Fred N. Six, Chairman; Charles S. Arthur; Ken Bronson; Georgia Neese Gray; Hon. Brooks Hinkle; and Hon. L. A. McNalley.

"As a result of the fact that potential additional violations of the Canons of Judicial Conduct surfaced during the presentation of such evidence on November 5 and 6, 1979, at the Reno County Courthouse, Hutchinson, Kansas, an Amended Notice of Formal Proceeding was filed pursuant to Rule 617 of the Rules of the Supreme Court Relating to Judicial Conduct. Subsequent thereto, Docket #197 was also filed and processed according to the Rules and consolidated with Docket #173 by Order of the Chairman following stipulation by the Examiner and counsel for Respondent that such should occur. On April 28 and 29, 1980, in the Kansas Judicial Center, Topeka, Kansas, pursuant to an Order of the Commission, evidence was presented on Counts III and IV of the Amended Notice of Formal Proceeding in Docket #173 and Docket #197, before Fred N. Six, Chairman; Charles S. Arthur; Hon. Edward F. Arn; Ken Bronson; Hon. O. Q. Claflin III; Georgia Neese Gray; Hon. Harold R. Riggs; and Hon. Brooks Hinkle.

"L. A. McNalley, by virtue of the fact that he resigned effective December 14, 1979, did not participate in the decision in this matter. Hon. O. Q. Claflin III, having been appointed to the Commission on December 14, 1979, did not participate in the hearing or decision upon Counts I and II of the Amended Notice of Formal Proceeding in Docket #173.

"Subsequent to the evidentiary hearing set forth previously, the Commission makes the following Findings of Fact, Conclusions of Law and Recommendations concerning Docket #173 and #197.

"Count I, Docket #173

"(1) Myrtle Hatzenbuehler appeared with her attorney, Charles Hyter, July 31, 1978, for trial to the Court on a charge of driving while intoxicated. The case was heard by Respondent, Richard J. Rome, who found Ms. Hatzenbuehler guilty of DWI and sentenced her to confinement in the Reno County Jail for one (1) year. A request for parole was denied. Several other similar requests by Mr. Hyter were also denied.

"(2) On September 28, 1978, the Reno County Bar Association had a noon luncheon at the Royal Inn, Hutchinson, Kansas. During that meeting a motion was made by John Shaffer and seconded by Michael Chalfant to have the Bar Association as a group go on record in favor of retaining the non-partisan method of selection of judges. The non-partisan selection method was currently in effect in Reno County, but a proposition to return to election of judges was to be on the ballot of the November, 1978, election.

"(3) Respondent was present at the meeting, and presided as the Association's president. Respondent

personally opposed non-partisan selection of judges. One reason for his opinion was that Respondent felt the voters should elect judges, but Respondent admitted he also was of that opinion because he personally would have no chance of being appointed to a district court position under the selection method of appointment. The District Court judge for Division One of the 27th Judicial District had been selected, and had been selected at a time when Respondent was an Associate District Court Judge.

"(4) In September of 1978, Mr. Kerry Granger, a member of the Reno County Bar, was retained to secure Ms. Hatzenbeuhler's release from confinement. While the exact time and sequence of events was not related exactly alike by the witnesses, the corroborating features of the testimony of Mr. Granger, Mr. Hyter, and District Judge Porter Brown indicate that after the Bar Association meeting at noon on the 28th of September, 1979, which meeting Mr. Granger did not attend, Mr. Granger approached Respondent with an oral request for probation from confinement for Ms. Hatzenbuehler.

"(5) Mr. Granger testified that Respondent replied 'Hyter's vote sealed her fate.' When questioned by Mr. Granger as to what he meant, Respondent replied 'Hyter's vote sealed her fate' and 'Oh, you're all in it together.'

"(6) Mr. Granger testified that he called Mr. Hyter (and his testimony was corroborated by Mr. Hyter) reported the statement made by Respondent that 'Hyter's vote sealed her fate,' and inquired what they should do.

"(7) Mr. Hyter and Mr. Granger agreed that the two attorneys should consult Judge Porter Brown, the administrative judge, for advice as to future action.

"(8) The attorneys testified, and were corroborated by the testimony of Judge Brown, that they met on the next day, Friday, and the statement made by Respondent was related to Judge Brown.

"(9) Judge Brown suggested that they let Respondent cool off and visit with him about the matter. No further discussion was had by either attorney with Respondent.

"(10) Respondent denied making the statement to Mr. Granger, stating it was impossible that Respondent made such a statement.

"(11) The Commission, however, in view of the fact Mr. Granger had no way of knowing that Mr. Hyter attended the Bar Association meeting or how he voted, the fact that Respondent did, the fact that between Thursday noon and Friday afternoon (28th and 29th of September, 1978), Mr. Granger reported the statement both to Mr. Hyter and then to Judge Brown, a report that was both contemporaneous with the making of the statement and at least four months before any investigation by the Commission commenced, believes the testimony of Mr. Granger, Mr. Hyter and Judge Brown.

"(12) The Commission specifically finds that Respondent stated to Mr. Granger when asked for probation for Ms. Hatzenbuehler that 'Hyter's vote sealed her fate.'

"(13) The statement meant the request for probation was denied at the time because Charles Hyter

had voted in favor of supporting the selective system of appointing judges.

"(14) Respondent on his own motion placed Ms. Hatzenbuehler on probation on October 13, 1978.

"(15) Ms. Hatzenbuehler went to Mr. Granger's office on October 14, 1978, and told Mr. Granger he didn't have anything to do with getting her out of jail, because she had been told that by Respondent.

"(16) It would therefore appear that on October 13 and 14, Respondent knew Mr. Granger had requested probation by Ms. Hatzenbuehler, although he later denied it.

"The Commission, in accordance with Rule 620 of the Rules of the Supreme Court Relating to Judicial Conduct, finds the charges set forth in Count I of the Notice of Formal Proceeding and Amended Notice of Formal Proceeding have been proven by clear and convincing evidence.

"Count II, Docket #173

"(1) While there is evidence to support the allegations in Count II of the Amended Notice of Formal Proceeding, the Commission finds the charges of Count II have not been proven by clear and convincing evidence.

"Count III, Docket #173

"(1) As indicated previously, on September 28, 1978, the Reno County Bar Association had a noon luncheon meeting at the Royal Inn, Hutchinson, Kansas. During that meeting a motion was made by John Shaffer and seconded by Michael Chalfant to have the Bar Association as a group go on record in favor

of retaining the non-partisan method of selection of judges. The non-partisan selection method was currently in effect in Reno County, but a proposition to return to election of judges was to be on the ballot of the November, 1978, election.

"(2) Respondent was present at the meeting, and presided as the Association's president. The motion endorsing the selection and appointment method was sustained by an overwhelming vote of approximately 30-3. Respondent personally opposed non-partisan selection of judges. One reason for his opinion was that Respondent felt the voters should elect judges, but Respondent admitted he was also of that opinion because he personally would have no chance of being appointed to a district court position under the selection method of appointment. The District Court Judge for Division One of the 27th Judicial District had been selected, and had been selected at a time when Respondent was an Associate District Court Judge.

"(3) There was clear and convincing evidence that Respondent had voiced his feelings that under the existing non-partisan selection method he would have no chance of advancing to a position as a district court judge.

"(4) There was testimony from various sources, including from attorneys who had practiced in Reno County from five (5) to twenty-eight (28) years, from District Court Judge Porter Brown and from Respondent's counsel's partner, that leads the Commission to conclude that while not every attorney who appeared in Respondent's court after the September 28th vote was treated differently than prior to the vote, certain attorneys were treated differently.

"(5) Respondent's personal feelings concerning the political issue of the manner of selection of judges affected his treatment of those attorneys and the outcome of certain of their cases.

"(6) For a period of time following the September 28th vote Respondent allowed his personal feelings about the selection of judges to interfere with and affect his decisions, affect the manner in which he disposed of cases which he heard, and the manner in which he conducted his office.

"(7) The testimony of witnesses O'Sullivan (the County Attorney since April, 1977), Forker (an attorney with twelve years experience), Childs (an attorney with five years experience), and Oswalt (an attorney with twenty-eight years experience) clearly sustains that conclusion.

"(8) The issue was important and serious enough that it caught the attention of Judge Porter Brown who testified that Respondent was displeased at the Bar Association's vote on September 28 and therefore reacted towards some attorneys for a period of a few days thereafter.

"(9) Respondent's reaction was severe enough that Mr. Childs altered the manner in which he handled cases and even considered asking one of his senior partners to take over a case before Respondent.

"(10) Respondent's reaction was also reflected in his statement to Mr. Hyter, which the Commission believes was made although denied by Respondent, shortly after the meeting on the 28th 'tell Mike (Mike Chalfant, Mr. Hyter's partner and one of Respondent's co-counsel) from now on it's by the book.'

"(11) Respondent's emotional reaction to the Bar Association vote and its impact on the manner in which he conducted his judicial duties is also reflected in the testimony that he kept a list of contributors to the election on his desk for a period of time and tossed it toward Mr. Oswalt, who was one of the contributors, with the comment 'here they are' referring to the lawyers who contributed and also that 'he hoped that we were happy that the silk stocking group had their way now.'

"(12) Respondent sought to prove that a list of contributors which Respondent admittedly had in his possession after December 28th on the official form used to report contributions, was not available until December 28 and 29, 1979, about a month after Mr. Oswalt reported a list being tossed at him.

"(13) But, Mr. Oswalt testified very convincingly that the list he saw was different, on different paper, and not on an official form.

"(14) No reason has been advanced why Mr. Oswalt would be in error in his testimony and from the two times he appeared before the Commission he gave the appearance of accurately reporting what had occurred.

"(15) The members of the Commission are satisfied that Respondent had in his possession a list other than Exhibit 6 (the official list prepared by Michael Chalfant in late December); that this other list was at least a partial list of contributors to the non-partisan selection committee; that this other list was in fact shown to Mr. Oswalt by Respondent and is the one (and Exhibit 6 is not the one) to which Mr. Oswalt was alluding in his testimony.

"(16) The Commission believes Mr. Oswalt's testimony, and also that of witnesses Forker, Childs, O'Sullivan, Hyter and Judge Brown and therefore finds pursuant to Rule 620, as set forth previously, that the charges of Count III of the Amended Notice of Formal Proceeding have been proven by clear and convincing evidence.

"Count IV, Docket #173

"(1) On March 28, 1979, a man named Earl Urban was tried and found guilty before Respondent.

"(2) He was fined and sentenced to one (1) year in the Reno County jail and was so confined on the 13th day of June, 1979.

"(3) On July 26, 1979, complaints were filed in the District Court of Reno County, Kansas, in cases No. 79-CR-357 and 79-CR-356 charging that on the 13th day of June, 1979, Earl Urban, George Joe Tate, and Gary Kepka, committed the crime of aggravated sodomy while in the Reno County jail.

"(4) The complaints for all three defendants were filed with Respondent and arrest warrants issued under his signature.

"(5) Subsequently, the case against Mr. Tate after being dismissed was refiled August 24, 1979, case No. 79-CR-413.

"(6) The charges involved in those three cases arose out of an incident occurring at the Reno County jail and allegedly involving the three named defendants, Urban, Tate and Kepka.

"(7) On August 6, 1979, Respondent issued an order setting Mr. Urban's preliminary hearing in 79-CR-356 for August 23, 1979. However, on August 20,

1979, a date when Respondent and his counsel appeared in Topeka, Kansas, for a prehearing conference in this case, the defendant, Urban, appeared with counsel before Judge J. Stanley Hill of Division 2 of the District Court of Reno County, Kansas, and plead guilty to a reduced charge of battery, a class B misdemeanor.

"(8) The Court file (Examiner's Exhibit 3) reflects that on the same date, Judge Hill authorized a work release and probation for Mr. Urban.

"(9) Since Mr. Urban was still confined in the Reno County jail pursuant to the sentence ordered in his DWI case, No. 78-TR-6293, a request for work release was made in that case by written motion on August 23, 1979.

"(10) The request was heard by Respondent on September 11, 1979. Respondent took the matter under advisement and filed a written opinion denying work release on September 12, 1979.

"(11) From the testimony and the Court files which have been received in evidence, it is uncontroverted that on September 12, 1979, when the written memorandum opinion denying work release in Mr. Urban's traffic case was filed, the criminal case alleging one count of aggravated sodomy was pending against Mr. Tate in the District Court of Reno County, Kansas.

"(12) Mr. Tate's preliminary hearing had originally been set for September 10, 1979, but was continued by Respondent at counsel's request to October 16, 1979.

"(13) The Court files (Examiner's Exhibits 1 and 2) reflect that Mr. Tate's case was assigned to Position No. 1 of the District Court of Reno County, Kansas,

Respondent's Court. That preliminary hearing was held on October 16, 1979, although Respondent did not preside because he was otherwise occupied with other litigation, and Mr. Tate was bound over to the District Court.

"(14) Commencing on December 18, 1979, Mr. Tate's case was tried to a jury which found him guilty on December 20, 1979.

"(15) The record is also clear that on September 12, 1979, the criminal case pending against Mr. Kepka involving two charges of aggravated sodomy was pending in the District Court of Reno County, Kansas, for trial, originally being set for trial September 24, 1979, and not tried until December 18, 1979.

"(16) Mr. Kepka was likewise found guilty as charged on the 20th day of December, 1979, in a trial conducted before the Hon. Porter Brown, Judge of Division 1 of the District Court of Reno County, Kansas.

"(17) The record is clear that on September 12, 1979, at a time when Mr. Kepka's case was awaiting jury trial and Mr. Tate's case was awaiting preliminary hearing in Respondent's court, Respondent issued his memorandum opinion denying Mr. Urban's request for work release in the traffic case No. 78-TR-6293.

"(18) That memorandum opinion which was admittedly made by Respondent reads as follows:

> " 'Now on this 11th day of September, 1979, the above matter comes on for hearing to the Court on the motion of the Defendant for work release. The State is present by the Assistant County Attorney, Timothy Chambers. The Defendant is

present in person and by his attorney, Steven Childs. Arguments are made, and the matter is taken under advisement.

" 'On March 28, 1979, the Defendant was sentenced to one year in the Reno County Jail in the above matter, and also fined in the amount of $250.00 plus costs. This is not the first case involving the Defendant in Reno County. He comes not as a stranger to the Court.

" 'In fact, as recently as July 26, 1979, this Defendant was charged by the Reno County Attorney's Office with the felony crime of attempted aggravated sodomy. He, along with two other jail inmates, participated in a mock trial involving the young victim. After being found guilty, the young man was kicked, beaten severely, and forced into anal and oral intercourse.

" 'For his cooperation with the Reno County Attorney's Office, this Defendant was rewarded with the reduced charge of simple battery. He pleaded guilty to this reduced charge on August 20, 1979, before Judge J. Stanley Hill. Judge Hill sentenced him to six months in the County Jail with the further reward or privilege of work release.

" 'It appears that part of Mr. Urban's reward for his participation and cooperation in the above scenario was to be a recommendation, by the County Attorney's Office, in the case at hand, for a work release on the remainder of his sentence.

" 'This Court will not participate in the rewarding of Mr. Urban for his participation in the rape and beating of the young inmate. It will not further reward Mr. Urban for his cooperation with the

County Attorney's Office in allowing him to escape from answering to the original charge in said matter. In short, the motion for work release is denied, and the Defendant is ordered to serve the the remainder of his sentence.' (Respondent's Exhibit 4)

"(19) Not only did Respondent issue that memorandum opinion, but he hand-delivered a copy of it to a news reporter, Randy Atwood, of the Hutchinson News, and mailed a copy of the same opinion to Ken Willard, news director of KWHK, a Hutchinson news station, and to Jerry Bohnan of Radio station KWBW.

"(20) The opinion itself supports the finding that Respondent stated as fact conclusions relating to the alleged crimes committed by Mr. Tate and Mr. Kepka.

"(21) Respondent also, in the memorandum opinion, expressed his opinion as to the wisdom and/or propriety of the disposition of the criminal case involving Mr. Urban.

"(22) The Commission reads the opinion as being critical of the action taken both by the Reno County Attorney's office, and District Judge J. Stanley Hill. From Respondent's testimony before the Commission on April 28 and 29, 1980, it is clear that Respondent did not approve of the action taken by the County Attorney's office in reducing Mr. Urban's charge.

"(23) It was also clear that Respondent intended to write the opinion in the manner he did and intended to cause it to be disseminated to the news media.

"(24) Respondent's reasons for writing the opinion in the manner that he did were that he felt that there was a situation concerning overcrowding that

was occurring in the jail that led to the alleged crime involved in the Urban, Tate and Kepka cases and because he indicated that he was required by law to state his reasons for denying work release.

"(25) Serious criminal charges were pending, including one case pending before Respondent, involving the same circumstances which he recited in his memorandum opinion, at the time he wrote and disseminated the memorandum opinion.

"(26) The Commission finds the charges contained in Count IV of the Amended Notice of Formal Proceeding have been proven by clear and convincing evidence.

"Docket #197

"(1) Sheriff James Fountain testified that on January 5, 1980, as he was walking in the hallway of the Law Enforcement Center in Hutchinson, he was approached by Respondent who said words to the effect 'let's go down to Convention Hall right now and put the shoes and gloves on and get this straightened out man-to-man.'

"(2) On January 4, 1980, at a time when Sheriff Fountain was out of town, his son was convicted following a plea of the charge of DWI and speeding and was sentenced pursuant to law by Respondent.

"(3) Respondent took a motion for probation under advisement and the Fountain boy spent that night in jail.

"(4) It is uncontroverted that there was a conversation between Respondent and the Sheriff on January 5, 1980.

"(5) The Sheriff had tried to contact Judge Rome at home on the evening of January 4, concerning what had occurred in Court and attempted to inquire of the Judge what had happened in Court on the 5th.

"(6) It was in response to the Sheriff's inquiry that Respondent made the statement.

"(7) Respondent denied making the statement recited by Sheriff Fountain.

"(8) The Sheriff's testimony, however, is corroborated by the County Attorney, Joe O'Sullivan who testified that contemporaneously with the alleged making of the statement, Sheriff Fountain came to his office and repeated the statement to Joe O'Sullivan.

"(9) Mr. O'Sullivan indicated that the Sheriff's apparent reaction to the statement was one of shock.

"(10) Mr. O'Sullivan further corroborated the Sheriff's testimony by indicating that subsequently the same day, Respondent admitted to Mr. O'Sullivan making the statement.

"(11) Mr. O'Sullivan could not remember the exact details of that conversation, but indicated Respondent confirmed what the Sheriff had said to be true.

"(12) Mr. O'Sullivan indicated that the Judge was irritated that the Sheriff had been trying to contact him concerning his son.

"(13) Based on the corroborated testimony of Sheriff Fountain and County Attorney O'Sullivan, the Commission finds that it has been proven by clear and convincing evidence that Respondent made the

statement attributed to him by the Sheriff in the Notice of Formal Proceeding to the effect that 'let's go down to Convention Hall and put the gloves and shoes on and get this straightened out man-to-man.'

"(14) Respondent denied that he made the alleged statement and gave reasons why he thought the County Attorney and the Sheriff had conspired to lie against him. No credible evidence giving any reason why either the Sheriff or the County Attorney would lie has been introduced.

"(15) As a matter of fact, Respondent himself testified that his relationship with each man was good and that no hostility was evident.

"From the evidence presented to it in the four (4) days of evidentiary hearing, from listening to Respondent's testimony at both hearings, from a review of the record at the November 5 and 6, 1979, hearings by the Commission, including Commissioners Arn and Riggs, from observing Respondent's demeanor while testifying, from observations of witnesses called by the Examiner who did not have any apparent motivation to lie about Respondent, the Commission finds that it cannot and does not believe Respondent's explanations of the various incidents set forth previously. The Commission therefore, pursuant to Rule 620, finds that the charges as contained in the Amended Notice of Formal Proceeding, Docket #173, Counts I, III and IV have been sustained by clear and convincing evidence and that the charges contained in the Notice of Formal Proceeding in Docket #197 have been sustained by clear and convincing evidence.

"CONCLUSIONS OF LAW

"The Commission therefore concludes:

"(1) Concerning Count I, Docket #173, of the Amended Notice of Formal Proceeding that Respondent violated the provisions of Canons 1 and 2 in that he acted in a manner that did not promote the public confidence in the integrity and impartiality of the judiciary and allowed his personal views or appeared to allow his personal views on the political issue of selection of judges to influence his judicial conduct or judgment.

"(2) The Commission further concludes concerning Count II, Docket #173, that it should be dismissed inasmuch as the Commission has determined that the factual allegations of the Amended Notice of Formal Proceeding are not clearly and convincingly supported by the evidence.

"(3) The Commission further concludes concerning Count III, Docket #173, of the Amended Notice of Formal Proceeding that Respondent violated the provisions of Canons 2 and 3 (A) (1) in that he acted in a manner that did not promote the public confidence in the integrity and impartiality of the judiciary and allowed his personal views or appeared to allow his personal views on the political issue of selection of judges to influence his judicial conduct and judgment.

"(4) The Commission further concludes concerning Count IV of the Amended Notice of Formal Proceeding that Respondent's actions as found previously violated Canons 2 and 3 (A) (3) and 3 (A) (6) of the Canons of Judicial Conduct.

"The Commission concludes that Respondent purposefully attempted to be critical of actions of the County Attorney by writing the memorandum decision in the way that he did and also critical of the actions of fellow Judge J. Stanley Hill in authorizing a work release. The Commission specifically finds that Respondent purposefully made allegations of fact and stated as conclusions factual matters that were at the time he made his statements being contested in two criminal cases, one of which was before him, and one of which was awaiting jury trial in the District Court of Reno County, Kansas, and subsequent to making such statements then purposefully and intentionally tried to get them publicized by delivering a copy and mailing a copy to the news media in Hutchinson, Kansas. The Commission concludes that Respondent's actions were purposeful and intentional.

"The testimony of Respondent as to his explanation of why he wrote the memorandum opinion demonstrates clearly that he does not have the judicial temperament required by the Canons of Judicial Conduct and that he purposefully utilized the opportunity of writing the memorandum opinion to publicly scold the County Attorney's office, a fellow District Judge, and to bring attention to what he considered to be a public political issue.

"(5) The Commission concludes concerning the allegations of Count I of Docket #197 based on the findings of fact set forth previously that the Respondent violated the provisions of Canons 1 and 2 (A), with conduct that tends to degrade the integrity of the judiciary and certainly does not promote public confidence in the judiciary.

"RECOMMENDATIONS

"Based on the foregoing Findings of Fact and Conclusions of Law, and in accordance with Rule 620 of the Rules of the Supreme Court Relating to Judicial Conduct, the Commission on Judicial Qualifications recommends the discipline of removal.

"Dated this 5th day of June, 1980."

The standard of proof to be applied to an inquiry relating to judicial conduct is that of clear and convincing evidence. *In re Rome*, 218 Kan. 198, Syl. ¶9. Respondent argues there is no clear and convincing evidence to support the Commission's findings and conclusions that he violated the respective canons. We have carefully examined the voluminous transcripts and exhibits herein and conclude the Commission's findings and conclusions are supported by clear and convincing evidence. We accept and adopt the findings and conclusions of the Commission.

We turn now to the question of the discipline to be imposed. The Commission has unanimously recommended the removal of respondent from office.

The violations herein are in sharp contrast to the violation involved in respondent's previous disciplinary proceeding (*In re Rome*, 218 Kan. 198). The earlier violation arose from the writing of a memorandum decision in poetic form. The poem was an injudicious attempt at humor, but, as this court stated at 208, "nor can it be said the memorandum decision was written with deliberate intent to harm anyone." The deliberate intent to harm is present in the violations herein and no one contends anything was said or done in jest.

A judicial disciplinary proceeding is an inquiry into the conduct of the judicial officer, the aim of which is

the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than the punishment of the individual. *In Re Rome* at 204. Judges, like all their fellow human beings, have varying degrees of judicial skills and abilities. At the very least the public can expect its judges to be fair and impartial. The public may decline to do business with an attorney—no like option exists as to a judge.

Partiality in the determination of cases is one of the gravest charges that may be leveled against a judge. Partiality arising from judicial vindictiveness is particularly opprobrious.

The respondent denies the occurrence of all of the acts which are the basis of the proceeding herein except for the written decision in Count IV. Consistent therewith, no evidence of mitigating circumstances has been offered by respondent except as to Count IV. Even there one cannot really characterize respondent's explanation of the purpose of the memorandum as evidence of mitigation. Had evidence of mitigating circumstances been offered it is difficult to see how the result herein could have been altered. As the California Supreme Court stated in *Cannon v. Commission on Judicial Qualifications,* 14 C.3d 678, 707, 122 Cal. Rptr. 778, 537 P.2d 898 (1975):

> "[W]e cannot 'conceive that there are circumstances in which bad faith itself can be excused by extraneous circumstances. There can be no mitigation for maliciously motivated unjudicial conduct. . . .' (*Spruance v. Commission on Judicial Qualifications,* 13 C.3d 778, 800, [119 Cal. Rptr. 841, 532 P.2d 1209 (1975)].)"

The findings and conclusions herein clearly demonstrate respondent's lack of judicial temperament. The court acknowledges receipt of four letters from attorneys,

each dated January 15, 1981, relative to the disposition of this proceeding, which have been submitted by respondent.

This court concludes it has no alternative but to accept the Commission's recommended discipline of removal. Because it is our duty to preserve the integrity and independence of the judiciary (Code of Judicial Conduct, Canon 1), we order Judge Richard J. Rome removed from office. This order is final forthwith.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 80-52241-S

State of Kansas, ex rel., Commission on
Judicial Qualifications, Petitioner,

v.

Richard J. Rome, Respondent.

You are hereby notified of the following action taken in the above entitled case:

Motion by Respondent for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date February 27, 1981

Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2061

In the Supreme Court of the United States

October Term, 1980

RICHARD J. ROME,
Petitioner,

vs.

STATE OF KANSAS, ex rel. COMMISSION ON JUDICIAL QUALIFICATIONS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether Petitioner received due process of law in the proceeding which culminated in his removal from office.

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OPINION BELOW

The opinion of the Kansas Supreme Court accepting a recommendation of the Kansas Commission on Judicial Qualifications for removal of Petitioner from office is reported as *State of Kansas, ex rel. Commission on Judicial Qualifications v. Richard J. Rome,* 229 Kan. 195, 623 P.2d 1307. The full text of the opinion is set out in Appendix A of the Petition for Certiorari. An Order denying motion for rehearing is set out as Appendix B in the Petition for Certiorari.

JURISDICTION

The jurisdictional statement is contained in the Petition for Certiorari, pp. 1-2.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment XIV

§ 1. . . . "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kansas Constitution, Article III

§ 1. "The Supreme Court shall have general administrative authority over all courts in this state . . . ."

§ 15. "Other judges shall be subject to retirement for incapacity and to discipline the suspension and removal for cause by the Supreme Court after appropriate hearing."

Rules of the Supreme Court of the State of Kansas relating to Judicial Conduct effective January 8, 1979, as follows:

Canon 1

"A Judge should uphold the integrity and independence of the judiciary."

Canon 2

"A Judge should avoid impropriety and the appearance of impropriety in all his activities."

Canon 3A. (3)

"A Judge should perform the duties of his office impartially and diligently.

"A. Adjudicative Responsibilities.

"(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control."

Canon 3A. (6)

"A Judge should perform the duties of his office impartially and diligently.

"A. Adjudicative Responsibilities.

"(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the Court."

Rule 609

"INVESTIGATION. An investigation by or under the direction of the examiner shall be made before formal proceedings are instituted. Such investigation may be made on the commission's own motion, and shall be made when the commission has received a complaint indicating that a judge has failed to comply with the Code of Judicial Conduct or has disability that seriously

interferes with the performance of judicial duties. The judge shall be contacted during the investigation, and shall be advised informally that an investigation is being made, and the subject thereof. The judge may present information to the examiner."

Rule 611(b)

"FORMAL PROCEEDINGS. (1) After the investigation has been completed, if the commission concludes formal proceedings should be instituted, or after a judge refuses to accept a cease and desist order, the commission shall forthwith issue a written notice to the judge advising him or her of the institution of formal proceedings to inquire into the charges against the judge. Such proceeding shall be entitled:

'BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS

Inquiry Concerning a Judge,

No. .....'

"(2) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his or her right to file a written answer to the charges within twenty days after service of the notice.

"(3) Unless service is waived in writing, the judge or the judge's guardian shall be sent a copy of the notice."

Rule 612

"ANSWER. Within twenty days after notice of formal proceedings, the judge may file an answer with the commission."

Rule 614

"HEARING. (a) At the time and place set for hearing the commission shall proceed with the hearing whether or not the judge has filed an answer or appears at the hearing. The examiner shall present the case in support of the charges in the notice of formal proceedings.

"(b) The failure of the judge to answer or appear at the hearing shall not be taken as evidence of the truth of the facts alleged to constitute grounds for discipline, suspension, removal or compulsory retirement. The failure of the judge to submit to a medical examination requested by the commission may be considered unless it appears that the failure was due to circumstances beyond the judge's control.

"(c) The proceedings at the hearing shall be recorded verbatim.

"(d) At the hearing before the commission not less than three members shall be present when evidence is introduced."

Rule 617

"Amendments to Notice or Answer. The commission at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to the proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such amendment is made the judge shall be given reasonable time both to answer the

amendment and to prepare and present his defense against the matters charged thereby."

Rule 620(a)

"COMMISSION DISPOSITION OR RECOMMENDATION. (a) If the commission finds the charges proven it shall either (1) admonish the judge, or (2) it shall recommend to the Supreme Court the discipline or compulsory retirement of the judge. 'Discipline' means public censure, suspension, or removal. The affirmative vote of five members of the commission is required for a finding that the charges have been proven and for a recommendation of discipline or compulsory retirement."

STATEMENT OF FACTS

The Constitution of the State of Kansas relating to the judiciary was amended following a 1972 constitutional amendment to specifically authorize the Supreme Court of the State of Kansas to administer the discipline of the judiciary of the state. See Kansas Constitution, Article III, Section 1, Section 15. Canons of Judicial Conduct were adopted by the Court to implement the Constitutional authority effective January 1, 1974. Those Canons were consistent with the Canons of Judicial Conduct adopted by the House of Delegates of the American Bar Association in November, 1972. At the same time that it adopted the Canons of Judicial Conduct, the Kansas Supreme Court in Rules 602 through 629 of its Rules Relating to Judicial Conduct organized the Kansas Commission on Judicial Qualifications, clothed it with general investigative authority and empowered it to conduct hearings and make recommendations to the Court concerning discipline, and provided the Commission with necessary powers to im-

plement its mandate. In Rule 609 of the Kansas Supreme Court Rules, it is provided that the investigation which may be commenced after a complaint must be made before formal proceedings are instituted and made with the provision that the Respondent/Judicial officer be contacted during the investigation, be advised that the investigation is pending and be given an opportunity to present information to the person making the investigation. The Rules then provide in Rule 611(b) that after an investigation has been completed, a formal proceeding, which is the equivalent of an adversary proceeding, may be instituted by the Commission and as a part of that commencement of formal proceeding, the Respondent/Judicial officer shall be advised of his or her right to file a written answer to the charges within a certain time period. Rule 612 then provides for the filing of such an answer with the Commission; Rule 613 provides for the hearing; Rule 614 provides for the manner of setting the time and place of the hearing; Rule 615 specifies that the rules of evidence applicable to civil cases apply to the hearings; Rule 616 suggests the procedural rights of the judge to defend against the charges by the introduction of evidence, to be represented by counsel and to examine witnesses, to have the right to issue subpoenaes for the attendance of witnesses or the production of documents; and Rule 618 provides for extensions of time to answer and for the commencement of a hearing. Rule 605 provides the procedure for compelling the attendance of witnesses and the production of documents as well as for conducting certain discovery matters. Rule 617 provides that the Commission at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer to conform to the proof or to set forth additional facts whether occurring before or after the commencement of the hearing. It is

further provided that in the event the notice of formal proceeding is amended that the Respondent/Judicial officer have a reasonable time both to answer the amendment and prepare and present its defense against the matters charged. The Commission is then given the authority to make recommendations if it finds the charges proven including the recommendation of removal from office.

Consistent with those procedural rules, on March 19, 1979, after receiving a complaint, the notice of preliminary investigation required by Rule 609 was forwarded to Respondent. The allegations set forth in that notice later constituted the basis of the notice of formal proceedings, the formal adversary proceeding filed pursuant to Rule 611(b) on June 7, 1979. Petitioner replied to the notice of preliminary investigation that "I refuse to furnish you, the Commission you represent, or any representative thereof any information concerning the above; all on the ground that it might intend to incriminate me," by letter of March 22, 1979. The notice of formal proceeding was subsequently filed on June 7, 1979 in Docket #173; an answer filed on July 24, 1979; a pre-hearing conference as authorized by Rule 605(f) was held on August 20, 1979. After consulting schedules of the availability of counsel and the Commission, an Order setting the hearing on the notice of formal proceeding was filed on September 21, 1979, setting the hearing for November 5 and 6, 1979. That hearing was actually held on November 5 and 6, 1979. At the outset of that hearing, the examiner[1] requested that the allegations of one of the charges be dismissed. The Commission dismissed those charges. The Commission's counsel then introduced evidence in sup-

1. Rule 604(c) provides for counsel designated by the Commission, who is the "examiner," whose function it is, inter alia, to present evidence in support of the allegations.

port of the remaining two allegations. The evidence consisted of the testimony of two attorneys of the Reno County Bar Association and the Administrative Judge of the District Court of Reno County, Kansas.

In general, the evidence introduced in support of the allegations of judicial misconduct tended to prove that the petitioner had allowed his views on a political issue to influence his disposition of judicial proceedings, and that he had made the equivalent of a threat against a bondsman (See Appendix A, Petition for Certiorari, hereinafter denominated Appendix, pp. A.6-A.9, A.21). Petitioner then introduced evidence denying the factual allegations of the charge as well as evidence supporting his own character and tending to impeach the credibility of one of the witnesses introduced by the examiner.

Petitioner's complaint as set forth in the Petition for Writ of Certiorari relates to amendments that were made in the notice of formal proceeding as a result of the November 5 and 6 hearing in Hutchinson, Kansas. Relevant to his argument is the chronology and reason for what occurred relating to the introduction of evidence at that hearing. The amendments to the notice of formal proceeding which were subsequently filed pursuant to Rule 617 of the Rules of the Supreme Court Relating to Judicial Conduct on December 10, 1979, were predicated upon evidence introduced as rebuttal evidence in the November 5 and 6 hearing. The evidence that constituted the basis of the amended notice was presented in the rebuttal testimony caused to be introduced by petitioner's assertions in petitioner's testimony that he did not allow political decisions to influence his judicial decisions and his introduction of the issue of character into the proceeding (See Appendix A, pp. A.9, A.13).

Petitioner's evidence alleged that his actions as a judicial officer concerning the disposition of cases and his treatment of persons in a judicial capacity did not change in anyway because of his reaction to results of a political issue in Reno County, Kansas, in September, 1978. That issue involved the method of selection of judges of the district court. Petitioner had presided, as president, at a September 28, 1978, meeting of the Reno County Bar Association when a resolution was adopted putting the Bar Association on record as supporting the non-partisan selection of judges as opposed to the election of judges by the public (the issue was to be presented on the ballot at the general election of November, 1978). Petitioner had testified in the hearings that one of the reasons why he was opposed to the non-partisan selection of judges was that would detrimentally affect his opportunity to advance to a position as a District Court Judge from his position as an Associate District Court Judge (Appendix A, A.7). Therefore, at the conclusion of Petitioner's defense, rebuttal and evidence was introduced attempting to refute or rebut the conclusions asserted by Petitioner that he did not allow the political issue of non-partisan selection of judges, and the position taken thereupon by the Bar Association, affect his decisions and his treatments of persons who appeared before him while he was performing his judicial duties. Six such witnesses were called to testify in rebuttal. They included witnesses Joseph O'Sullivan, the County Attorney, Attorney Dan Forker, Attorney Steven Childs, and Attorney D. Stewart Oswalt (Appendix A, A.11). Prior to the November 5 and 6, 1979, hearing, a statement that had been taken by the Examiner from the witness, Joseph O'Sullivan because O'Sullivan had been listed as one of Petitioner's witnesses, was supplied to counsel for Petitioner. Prior to November 5 and 6 no statements had been taken of the other three attonreys. Counsel for Petitioner

had also been provided a statement taken from James Fountain, Reno County Sheriff, prior to the November 5 and 6, 1979, hearing.

It was the testimony in rebuttal of the witnesses O'Sullivan, Forker, Childs, and Oswalt which formed the basis for the amended notice of formal proceedings alleging Count III therein that Petitioner had allowed the Bar Association's position on a political issue to influence his judgments and actions while performing judicial duties, that partially forms the basis of Petitioner's allegation of constitutional error. Count IV of the amended petition related to a memorandum opinion Petitioner had filed in a criminal case (Appendix A, A.13-A.18). The Commission determined that the nature of the memorandum opinion, not its effect, was an attempt to criticize a fellow judge, the County Attorney, and the manner and method by which the memorandum opinion was issued constituted violations of the Canons of Judicial Conduct (Appendix A, A.17-A.18, A.21). The memorandum opinion was mentioned in the statement taken from the witness O'Sullivan who testified in rebuttal. The memorandum opinion was not part of the examiner's case when the witness O'Sullivan testified. Petitioner personally cross-examined the witness O'Sullivan and during that cross-examination raised the issue of the memorandum opinion. The examiner objected to the introduction of the memorandum opinion in evidence and to cross-examination of the witness O'Sullivan concerning its content because the same was absolutely irrelevant to the testimony that O'Sullivan had given. That objection was overruled. The memorandum opinion in question had been written on September 12, 1980 (Appendix A, A.15), approximately one and one-half months before the scheduled hearing on the notice of formal proceedings and was not related to the allegations contained in the notice of formal proceeding which

concerned events occurring in the fall of 1979. The memorandum opinion which gave grounds for Count IV of the amended notice of formal proceeding was made part of the hearing on November 5 and 6 by Petitioner over the objection of the examiner. Therefore, pursuant to the provisions of Rule 617 which specifically authorizes amendments to the notice of formal proceeding, an amended notice of formal proceeding was filed on December 10, 1979. The amended notice authorized Petitioner to file a response or answer. Subsequently, a second hearing at which evidence upon the amended notice was to be presented was set for April 28 and 29, 1980. At that hearing, Petitioner was entitled to and did introduce any and all evidence he wished, that was legally admissible, concerning the allegations in Counts III and IV of the amended notice.

During the interval from November 5 and 6, 1979, to April 28 and 29, 1980, an additional investigation was made concerning an additional charge of improper conduct against Petitioner that was not in any way a part of the November 5 and 6, 1979, hearing. In general, that assertion was that the Petitioner had challenged the Sheriff of Reno County, Kansas, to a fight in the Reno County Courthouse. The Rule 609 Notice of Preliminary Investigation, was mailed to Petitioner, dated December 4, 1979. By a letter dated January 29, 1980, Petitioner replied and denied the factual basis of the accusations. Subsequently, a notice of formal proceedings on Count I in Docket #197 was filed on March 17, 1980. At Petitioner's request, the two cases were consolidated for hearing and evidence introduced on Counts III and IV of Docket #173 and Count I of Docket #197 on April 28 and 29, 1980. Following four days' worth of hearings, the Commission on Judicial Qualifications found the allegations of Counts I, III, IV in Docket #173 and Count I in Docket #197 had been

proven by clear and convincing evidence, and that the allegations of Count II of Docket #173 had not been proven by clear and convincing evidence and recommended the discipline of removal from office. The Supreme Court on review accepted the recommendation. This Petition followed.

ARGUMENT AND AUTHORITIES

I. Petitioner Was Not Denied Due Process of Law in the Judiciary Disciplinary Proceeding Which Culminated in His Removal From Office by Order of the Supreme Court of the State of Kansas.

Petitioner's complaint is that he was denied due process of law. He relies solely in support of that allegation upon this Court's decision in *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.ed. 2d 117 (1968). Petitioner was not denied due process of law, procedurally or otherwise. A detailed procedure protecting any respondent's rights had been adopted by the Kansas Supreme Court in disciplinary proceedings and had been enforced during the disciplinary proceeding against Petitioner. The sequence of events in Petitioner's case are significantly different than those in the *Ruffalo* case, thus distinguishing that case.

The basis of due process is notice and an opportunity to be heard.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Han-*

over Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.ed. 865 (1950).

Fair notice of the charge is included. *In re Ruffalo, supra,* at U.S.

> "The fundamental requisite of due process is *notice, and an opportunity for a full and complete hearing.*" *Carrigg v. Anderson,* 167 Kan. 238, 246, 205 P.2d 1004 (1949).

In Petitioner's case, it was obvious that he was provided with all of the procedural tools to be apprised of what was going on in the proceeding against him and given a full and complete opportunity to respond or present anything in the way of defense that he wished, as long as that attempt complied with the rules of procedure and evidence.

Concerning Petitioner, he was adequately protected with regard to notice and opportunity to be heard. He was first notified of the original allegations on March 19, 1979, and then originally notified of the allegations of Docket #197 on December 4, 1979. Subsequent to the preliminary notice of the first charges, he responded by saying that he had nothing to say. He was then notified formally on June 7, 1979, in the original notice of formal proceeding. He was given an opportunity to present anything that he wished as long as the proposed evidence was legally admissible, at a two-day hearing on November 5 and 6, 1979. Based on some evidence that was presented in rebuttal at that hearing, and on a written document prepared and filed by Petitioner, the knowledge of which became known a month to a month and a half before the November 5 and 6 hearing, an amended notice of formal proceeding notified Petitioner of additional charges. Those charges were not based on his testimony. He was

not trapped into incriminating himself, so to speak. Following the filing of the amended notice of formal proceeding on December 10, 1979, Petitioner was again given the opportunity to present any defense that he had in a two-day hearing on April 28 and 29, 1980. That he did.

Concerning the due process requirement of an opportunity to be heard, there were, to start with, four days' worth of oral testimony taken. Pursuant to Rules of the Supreme Court Relating to Judicial Conduct, hearings were set concerning the allegations of misconduct (Rule 613); Petitioner had available various discovery tools prior to the actual hearing (Rule 605); Petitioner had the opportunity to present evidence in his defense (Rule 616); Petitioner had the right to be represented by counsel as he was (Rule 616); and Petitioner had the right to subpoena witnesses or written documents in his defense, which he did (Rule 616).

Rule 617 of the Rules of the Kansas Supreme Court Relating to Judicial Conduct provides that, as do comparable procedural regulations in the Kansas Code of Civil Procedure (See K.S.A. 60-215), the Federal Code of Civil Procedure (See Federal Rule 15), and presumably the codes of procedure of most jurisdictions, that an amendment to the proceeding may be made to consider evidence that is presented at a hearing among other things. The amended notice of the two counts, III and IV, of Docket #173 did not concern the oral testimony of Petitioner in the defense of the original charge against him. It consisted of the testimony of four attorneys in rebuttal, and of a document which had been filed in a Court case in Reno County, Kansas, on September 12, 1979.

In re Ruffalo does not require the conclusion that Petitioner was deprived of due process. First, it is distin-

quishable on its facts. *In re Ruffalo*, the conviction which resulted in disbarment was based solely on testimony of the Respondent/Attorney made in defense of the original charge. See 390 U.S., at 549. In this case that is not so. The amended notice concerned Counts III and IV of Docket #173. Count III was predicated upon the testimony of four attorneys, not Petitioner's testimony (Appendix A, A.11). Count IV was predicated upon a memorandum opinion that had been written and filed on September 16, 1979, by Petitioner in the criminal case in Reno County, Kansas (Appendix A, A.15-A.17). If that opinion constituted the basis of conduct contrary to the Canons of Judicial Conduct in the State of Kansas, its contents and existence was determined prior to the hearing on November 5 and 6, 1979, and testimony by Petitioner was not in any way related to it. That opinion had been filed one and one-half months before the November 5 and 6 hearing and a year after the original notice of formal proceeding had been filed (Appendix A, A.15).

Presumably, it would have been possible during the pendency of the original notice of formal proceeding if anything additional occurred that might form the basis of an additional charge, to secure a continuance of the original hearing to allow for the use of the procedural protections provided in the Kansas rules including the notice of preliminary investigation (which is mandatory); and the entire proceeding could have been continued to some future date when the entire investigation, including the new matters might have been completed had not additional new violations occurred. Of course, that method of conducting the proceeding could give any person who is the subject of such a proceeding a ready-made opportunity to postpone the proceeding, including the additional alleged improprieties, indefinitely. Further, if that had been done,

in view of the fact that Petitioner had complained that he wanted an early disposition of the original charges, he would then be complaining that the entire process took too long and any right that he had to a speedy resolution of the matter had been violated.

Suffice it to say that a set of procedural rules designed to protect and implement his rights to fair notice and an opportunity to be heard were and are in effect concerning judicial disciplinary hearings in the State of Kansas. They were utilized by Petitioner and in Petitioner's case and his rights to be accorded due process of law have not in anywise been violated.

One other matter concerning *In re Ruffalo, supra,* should be observed. This Court's decision in that case related principally to its supervisory authority over the constituency of the bar of the federal court. The opinion itself and a concurring opinion note that the direct proceedings emanating from the Courts in Ohio, through a Petition for a Writ of Certiorari to an Ohio Court, was denied. See 390 U.S. 545, 552. See *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964). That would indicate that as far as the ability of the State to discipline its judicial officer even if *Ruffalo* were applicable factually, no grounds to support this Petition for Writ of Certiorari exists.

CONCLUSION

It is submitted that the recommendation of the State of Kansas Commission on Judicial Qualifications was made after hearings which accorded Petitioner due process of law, and those recommendations as accepted and affirmed by the Supreme Court of the State of Kansas should stand. The Petition for Certiorari should be denied.

Respectfully submitted,

THE STATE OF KANSAS EX REL.
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Richard J. Rome, Attorney at Law, 216 West 2nd Street, Hutchinson, Kansas 67501, by depositing same in the United States mail, postage prepaid, on the 20th day of July, 1981.

EDWARD G. COLLISTER, JR.